LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 24 1964
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963.

Nos. 71 and 73

FEDERAL POWER COMMISSION, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 71
CITY OF COLTON, CALIFORNIA, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 73

PETITION FOR REHEARING

ROLLIN E. WOODBURY,
HARRY W. STURGES, JR.,
JOHN R. BURY,
601 West Fifth Street,
Los Angeles 17, California,
BORIS H. LAKUSTA,
310 Sansome Street,
San Francisco 4, California,
Attorneys for Southern California Edison Company.

GRAHAM JAMES & ROLPH,
ALEXANDER D. CALHOUN, JR.,
E. MYRON BULL, JR.,
310 Sansome Street,
San Francisco 4, California,
Of Counsel.

PERKIN-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

I. Southern California Edison Company respectfully petitions that the court reconsider its conclusion in the Attleboro issue 2

II. Southern California Edison Company respectfully petitions that the court reconsider its conclusion on the Boulder Canyon Project legislation 5

Conclusion 6

Table of Authorities Cited

Cases

Pages

Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498 (1942) 2

Panhandle Eastern Pipeline Co. v. Public Service Commission, 332 U.S. 507 (1947) 2

United States v. Public Utilities Commission of California, 345 U.S. 295 (1953) 2, 3

Statutes

Boulder Canyon Project Act:
Section 6 ..... 5, 6

Federal Power Act:
Part II 3, 5, 6
Section 20 5

Legislative Reports

Senate Report No. 817, 83rd Cong., 2d Sess., 1954 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

Nos. 71 and 73

FEDERAL POWER COMMISSION, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 71
CITY OF COLTON, CALIFORNIA, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 73

PETITION FOR REHEARING

Southern California Edison Company respectfully petitions for rehearing following the opinion of the Court rendered on March 2, 1964. The company has been advised that the California Public Utilities Commission will file a petition for rehearing also.

I. SOUTHERN CALIFORNIA EDISON COMPANY RESPECTFULLY PETITIONS THAT THE COURT RECONSIDER ITS CONCLUSION ON THE ATTLEBORO ISSUE.

The opinion states that the Federal Power Act reveals an intent by Congress to abandon the constitutional test of national versus state interest and to adopt "a more mechanical test which would bring under federal regulation all sales of electric energy in interstate commerce at wholesale except those specifically exempted . . ." In reaching that conclusion the Court states that "we do not write on a clean slate". In so stating the Court seems to rely upon dicta in earlier cases, particularly *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498 (1942). Even though this Court now characterizes that case as "holding" that Congress undertook to regulate all wholesale sales without the necessity of determining the boundary line of state constitutional power, the case involved the interests of more than one state because of the two different out-of-state gas supplies; for that reason the matter was beyond state regulatory control, and comments respecting a cleavage based on a mechanical test of wholesale versus retail were dicta.

In stating that the *Illinois Natural* conclusion "has been consistently reaffirmed in subsequent cases", the Court refers to language which again is dictum. It refers to the first Panhandle decision, *Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507 (1947) and to *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953). When the Court said in the first *Panhandle* case that

> "the line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive users"

the Court was expressing dictum because a retail sale was involved and all retail sales are expressly excluded from the Federal Power Act, whereas no such language appears with respect to wholesale sales. Again when the Court said in *United States v. Public Utilities Commission of California* that

> "Congress interpreted that case [Attleboro] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power",

the Court was expressing dictum because the conflicting interests of two states were clearly involved.

We respectfully suggest that the Court, by relying upon the sweeping dicta of the decisions referred to, was diverted from giving full effect to the statutory history which indicates so strongly that Congress was insistent upon preserving to the states whatever constitutional power they could exercise before passage of the Federal Power Act, Part II. It is undeniable that the effect of the present decision is to take away from the states, power which they could constitutionally exercise in the absence of the Federal Power Act. It is undeniable that promises were made to the states that none of their powers which could constitutionally be exercised prior to the Act would be taken away. We respectfully suggest that the Congress was concerned not with "drawing a bright line easily ascertained between state and federal jurisdiction", as the Court now states, but rather with filling the constitutional gap of Attleboro. The concept of a bright line, and a mechanical test, has the lure of supposed simplicity, but we find nothing in the history to suggest that Congress was striving for simplicity. On the contrary it sought only to close the Attleboro gap.

The Court refers to the cognate Natural Gas Act and to the fact that that Act was amended in 1954 by the Hinshaw Amendment in order to remove from FPC jurisdiction those sales where only one state has an interest. The Court also refers to recent efforts before Congress to amend the Federal Power Act in similar fashion and to the fact that such efforts have failed. We respectfully suggest that if anything, this history emphasizes that the Federal Power Act was not intended to give the Federal Power Commission jurisdiction over wholesale sales where the interests of only one state are involved. This is especially true in the light of the Senate Committee Report on the Hinshaw Amendment which stated that (S.Rep.No. 817, 83d Cong., 2d Sess., 1954):

> "In making this clarification the legislation *reaffirms* and is thoroughly consistent with the *original* intent of Congress in enacting the Natural Gas Act; namely that the Act was to supplement and not supplant state regulation." (Emphasis added.)

Administration by the Federal Power Commission under the Natural Gas Act has proceeded under this amendment without embarrassing the Federal Power Commission or interfering with its proper functions. The same would be true for electric utility regulation under the interpretation of the Federal Power Act which Southern California Edison Company advocates.

II. SOUTHERN CALIFORNIA EDISON COMPANY RESPECTFULLY PETITIONS THAT THE COURT RECONSIDER ITS CONCLUSION ON THE BOULDER CANYON PROJECT LEGISLATION.

The opinion states that the legislative history of Part II of the Power Act demonstrates that Congress believed that Attleboro and the related cases compelled it to forego its assumption as to state regulation and to displace it with comprehensive federal regulation. While one may accept the proposition that comprehensive federal regulation was intended to displace the prior interstitial action, it is still necessary to determine *whom* Congress intended to exercise such comprehensive regulatory power. We respectfully submit that the Court's opinion failed to give appropriate consideration to this question.

The opinion states that a parallel exists between Section 6 of the Boulder Canyon Project Act and Section 20 of the Power Act and that both regulatory schemes were superseded by Part II. It does not follow from this, however, that the authority of the Secretary of the Interior was thereby terminated; Section 6 of the Boulder Canyon Project Act specifically provides that the Secretary of the Interior shall control the rates for the resale of Hoover energy and in so doing shall conform with the the provisions of law *thereafter devised* for the protection of the investor and the consumer. By this means, such comprehensive regulatory authority as was thereafter established by Part II of the Power Act was, and is, vested in the Secretary of the Interior rather than the Federal Power Commission. To hold otherwise is to disregard the plain words of the statute and to frustrate Congress's plan for the full and effective management and control

of this project by the Secretary of the Interior. The legislative history establishes beyond dispute the intent of Congress to remove the Hoover project from the sphere of influence of the Federal Power Commission.

We submit that the superseding scheme found by the Court to have resulted from Part II of the Federal Power Act could properly be carried out by the authority of the Secretary of the Interior as specifically contemplated by the Boulder Canyon Project Act and therefore the express words of the statute in Section 6 should not be deemed repealed by implication.

CONCLUSION

For the foregoing reasons Southern California Edison Company respectfully petitions for rehearing of this cause.

ROLLIN E. WOODBURY,
HARRY W. STURGES, JR.,
JOHN R. BURY,
BORIS H. LAKUSTA,
Attorneys for Southern California Edison Company.

GRAHAM JAMES & ROLPH,
ALEXANDER D. CALHOUN, JR.,
E. MYRON BULL, JR.,
Of Counsel.

March 23, 1964.

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 1964 I served copies of the Petition for Rehearing in the above-captioned matters upon the following parties by first-class mail (air mail to those outside San Francisco, California), postage prepaid:

Archibald Cox, Solicitor General of the United States;
Ralph S. Spritzer and
Frank Goodman, Assistants to the Solicitor General;
Department of Justice,
Washington 25, D. C.

Richard W. Solomon, General Counsel;
Howard E. Wahrenbrock, Solicitor;
Thomas M. Debevoise, Assistant General Counsel, and
Peter H. Schiff, Attorney;
Federal Power Commission
Washington 25, D. C.

Mary Moran Pajalich, Counsel for Public Utilities Commission of the State of California
5072 State Building
San Francisco 2, California

John W. Cragun, Counsel for the City of Colton
1616 H Street, N.W.
Washington 6, D. C.

Reuben Goldberg, Counsel for the City of Colton
1739 K Street, N.W.
Washington 6, D. C.

Northcutt Ely, Counsel for the American Public Power Association, *amicus curiae*.
Ely, Duncan and Bennett
1200 Tower Building
Washington 5, D. C.

Certificate of Counsel

Boris H. Lakusta, being one of counsel for Southern California Edison Company, certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

Boris H. Lakusta.